

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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MARK BINEGAR,

Plaintiff,

v.

CONNIE BISBEE, *et al.*,

Defendants.

Case No. 3:16-cv-00045-MMD-WGC

SCREENING ORDER

Plaintiff, who is a prisoner in the custody of the Nevada Department of Corrections ("NDOC"), has submitted a civil rights complaint pursuant to 42 U.S.C. § 1983 and has filed an application to proceed *in forma pauperis*. (ECF No. 1-1, 1.) The Court now screens Plaintiff's civil rights complaint pursuant to 28 U.S.C. § 1915A.

I. SCREENING STANDARD

Federal courts must conduct a preliminary screening in any case in which a prisoner seeks redress from a governmental entity or officer or employee of a governmental entity. See 28 U.S.C. § 1915A(a). In its review, the court must identify any cognizable claims and dismiss any claims that are frivolous, malicious, fail to state a claim upon which relief may be granted or seek monetary relief from a defendant who is immune from such relief. See 28 U.S.C. § 1915A(b)(1),(2). *Pro se* pleadings, however, must be liberally construed. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). To state a claim under 42 U.S.C. § 1983, a plaintiff must allege two essential elements: (1) the violation of a right secured by the Constitution or laws of the United

1 States, and (2) that the alleged violation was committed by a person acting under color
2 of state law. See *West v. Atkins*, 487 U.S. 42, 48 (1988).

3 In addition to the screening requirements under § 1915A, pursuant to the Prison
4 Litigation Reform Act (PLRA), a federal court must dismiss a prisoner's claim, if "the
5 allegation of poverty is untrue," or if the action "is frivolous or malicious, fails to state a
6 claim on which relief may be granted, or seeks monetary relief against a defendant who
7 is immune from such relief." 28 U.S.C. § 1915(e)(2). Dismissal of a complaint for failure
8 to state a claim upon which relief can be granted is provided for in Federal Rule of Civil
9 Procedure 12(b)(6), and the court applies the same standard under § 1915 when
10 reviewing the adequacy of a complaint or an amended complaint. When a court
11 dismisses a complaint under § 1915(e), the plaintiff should be given leave to amend the
12 complaint with directions as to curing its deficiencies, unless it is clear from the face of
13 the complaint that the deficiencies could not be cured by amendment. See *Cato v.*
14 *United States*, 70 F.3d 1103, 1106 (9th Cir. 1995).

15 Review under Rule 12(b)(6) is essentially a ruling on a question of law. See
16 *Chappel v. Lab. Corp. of America*, 232 F.3d 719, 723 (9th Cir. 2000). Dismissal for
17 failure to state a claim is proper only if it is clear that the plaintiff cannot prove any set of
18 facts in support of the claim that would entitle him or her to relief. See *Morley v. Walker*,
19 175 F.3d 756, 759 (9th Cir. 1999). In making this determination, the court takes as true
20 all allegations of material fact stated in the complaint, and the court construes them in
21 the light most favorable to the plaintiff. See *Warshaw v. Xoma Corp.*, 74 F.3d 955, 957
22 (9th Cir. 1996). Allegations of a *pro se* complainant are held to less stringent standards
23 than formal pleadings drafted by lawyers. See *Hughes v. Rowe*, 449 U.S. 5, 9 (1980).
24 While the standard under Rule 12(b)(6) does not require detailed factual allegations, a
25 plaintiff must provide more than mere labels and conclusions. *Bell Atlantic Corp. v.*
26 *Twombly*, 550 U.S. 544, 555 (2007). A formulaic recitation of the elements of a cause of
27 action is insufficient. *Id.*

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1 Additionally, a reviewing court should “begin by identifying pleadings [allegations]
2 that, because they are no more than mere conclusions, are not entitled to the
3 assumption of truth.” *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). “While legal
4 conclusions can provide the framework of a complaint, they must be supported with
5 factual allegations.” *Id.* “When there are well-pleaded factual allegations, a court should
6 assume their veracity and then determine whether they plausibly give rise to an
7 entitlement to relief.” *Id.* “Determining whether a complaint states a plausible claim for
8 relief . . . [is] a context-specific task that requires the reviewing court to draw on its
9 judicial experience and common sense.” *Id.*

10 Finally, all or part of a complaint filed by a prisoner may therefore be dismissed
11 *sua sponte* if the prisoner’s claims lack an arguable basis either in law or in fact. This
12 includes claims based on legal conclusions that are untenable (e.g., claims against
13 defendants who are immune from suit or claims of infringement of a legal interest which
14 clearly does not exist), as well as claims based on fanciful factual allegations (e.g.,
15 fantastic or delusional scenarios). *See Neitzke v. Williams*, 490 U.S. 319, 327-28
16 (1989); *see also McKeever v. Block*, 932 F.2d 795, 798 (9th Cir. 1991).

17 **II. SCREENING OF COMPLAINT**

18 Plaintiff sues members of the Nevada Parole Board, including: Connie Bisbee,
19 Ed Gray, Lucille Monterde, Michael Keeler, Susan Jackson, and Darla Foley. (ECF No.
20 1-1 at 2-3.) Plaintiff alleges two counts and seeks declaratory and injunctive relief. (*Id.* at
21 5-12, 16.)

22 Plaintiff alleges the following in his complaint: Defendants Connie Bisbee, Ed
23 Gray, Lucille Monterde, Michael Keeler, Susan Jackson, and Darla Foley discriminated
24 against Plaintiff and denied him a fair and unbiased parole hearing. (*Id.* at 4.) Bisbee, as
25 Chairman of the Nevada Parole Board, has a personal policy that causes undue
26 discrimination against offenders she deems unworthy of parole. (*Id.* at 5.) The policies
27 and training that Bisbee provides the other Parole Board members causes them to be
28 systematically biased against any offender that Bisbee does not think should be

1 paroled. (*Id.*) These offenders are unjustly denied parole, without any evidence to
2 support the decisions. (*Id.*) Defendants ignore the risk assessment guidelines and use
3 their own separate guidelines as to how much time an inmate should serve. (*Id.* at 4.)
4 Plaintiff's prison and criminal record indicate he would be a good candidate for parole.
5 (*Id.* at 5.) However, Bisbee's policies caused Plaintiff to be denied parole based on the
6 nature of his conviction for first degree murder. (*Id.*) Defendant Foley denied Plaintiff's
7 request for reconsideration of his parole hearing. (*Id.* at 4.)

8 Further, prisoners similarly situated to Plaintiff, that being general population
9 medium custody prisoners, are generally granted parole even when their prison and
10 criminal record indicate they are not good candidates for parole. (*Id.* at 5-6.) Plaintiff
11 alleges that he is being subjected to bias, discrimination, and denial of equal protection
12 solely because of the crime he was convicted of (first degree murder) and due to a letter
13 from the Clark County district attorney instructing the Parole Board to deny Plaintiff
14 parole. (*Id.* at 6-8.) Plaintiff's mitigating factors outweigh his aggravating factors and the
15 Parole Board makes arbitrary and unregulated decisions which deny Plaintiff the right to
16 a fair and unbiased hearing. (*Id.* at 8, 10.)

17 Plaintiff has been denied parole since 2003. (*Id.* at 8.) At each parole hearing,
18 Plaintiff was given benchmarks to complete. (*Id.*) Plaintiff has met these benchmarks
19 and continues to be denied parole. (*Id.*) Plaintiff alleges that he should be paroled the
20 same as any other inmate that has served the minimum sentence, has minimal criminal
21 history, and is not a disciplinary problem in prison. (*Id.* at 10.) Instead, the Parole Board
22 makes arbitrary and unregulated decisions which deny him his right to a fair hearing
23 solely based on the nature of the crime he was convicted of and due to the letter from
24 Clark County district attorney. (*Id.* at 8, 10-11.)

25 Plaintiff alleges that his rights to due process and equal protection have been
26 violated. (*Id.* at 5, 8.)

27 The Supreme Court has held that a prisoner in state custody cannot use a §
28 1983 action to challenge "the fact or duration of his confinement," but instead must seek

1 federal habeas corpus relief or the appropriate state relief. *Wilkinson v. Dotson*, 544
2 U.S. 74, 78 (2005). In *Wilkinson*, the Supreme Court held that “a state prisoner’s § 1983
3 action is barred (absent prior invalidation) — no matter the relief sought (damages or
4 equitable relief), no matter the target of the prisoner’s suit (state conduct leading to
5 conviction or internal prison proceedings) — if success in that action would necessarily
6 demonstrate the invalidity of confinement or its duration. *Id.* at 81-82.

7 The Ninth Circuit has held that “a challenge to the procedures used in the denial
8 of parole necessarily implicates the validity of the denial of parole and, therefore, the
9 prisoner’s continuing confinement.” *Butterfield v. Bail*, 120 F.3d 1023, 1024 (9th Cir.
10 1997). “This is true whether that denial is alleged to be improper based upon procedural
11 defects in the parole hearing or upon allegations that parole was improperly denied on
12 the merits.” *Id.* The Ninth Circuit has further found that prisoners’ claims that are based
13 on the “deceit and bias” on the part of the decision makers and on allegations that their
14 prolonged incarcerations are due to the purported bias of state officials imply the
15 invalidity of the prisoners’ confinement. *McQuillion v. Schwarzenegger*, 369 F.3d 1091,
16 1097 (9th Cir. 2004).

17 In this case, Plaintiff’s claims challenge the allegedly improper procedural defects
18 in the parole process and the purported bias of the parole board members. As such,
19 Plaintiff’s claims challenge the invalidity of his confinement and fail to state a § 1983
20 civil rights claim. The Court dismisses the complaint for failure to state a cognizable
21 § 1983 claim, with prejudice, as amendment would be futile. However, Plaintiff may
22 raise these allegations in a habeas corpus proceeding.

23 **III. CONCLUSION**

24 For the foregoing reasons, it is ordered that the application to proceed *in forma*
25 *pauperis* (ECF No. 1) is denied as moot.

26 It is further ordered that the Clerk of the Court file the complaint (ECF No. 1-1).

27 It is further ordered that the complaint is dismissed in its entirety, with prejudice,
28 as amendment would be futile, for failure to state a cognizable 42 U.S.C. § 1983 claim.

1 It is further ordered that the Clerk of the Court send Plaintiff two (2) copies of an
2 *in forma pauperis* application form for a prisoner, one (1) copy of instructions for the
3 same, two (2) copies of a blank 28 U.S.C. § 2254 habeas corpus form, and one (1) copy
4 of instructions for the same.

5 It is further ordered that Plaintiff may file a habeas corpus petition and *in forma*
6 *pauperis* application in a new action, but he may not file any further documents in this
7 action.

8 It is further ordered that this Court certifies that any *in forma pauperis* appeal
9 from this order would not be taken "in good faith" pursuant to 28 U.S.C. § 1915(a)(3).

10 It is further ordered that the Clerk of the Court enter judgment accordingly.

11 DATED THIS 4th day of August 2016.

A handwritten signature in blue ink, appearing to read 'Miranda M. Du', is written over a horizontal line.

MIRANDA M. DU
UNITED STATES DISTRICT JUDGE